IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1982

NO. 82-1554

CHARLES E. STRICKLAND, SUPERINTENDENT
FLORIDA STATE PRISON, JIM SMITH, ATTORNEY
GENERAL OF FLORIDA, AND LOUIE L. WAINWRIGHT,
SECRETARY OF FLORIDA DEPARTMENT OF CORRECTIONS,

Petitioners,

-vs-

DAVID LEROY WASHINGTON,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petition for writ of certiorari to consider the constitutional standard for review of claims of ineffective assistance of counsel at a capital sentencing proceeding should be denied when there is an independent and well-established non-constitutional basis for affirming the judgment of the Court of Appeals.

2. Whether certiorari is inappropriate because the questions presented are not ripe for review, since the Court of Appeals remanded the case to the district court for additional factual determinations which could obviate, or at the very least, clarify the scope of the constitutional questions presented by petitioners.

3. Whether certiorari is inappropriate, since the Court of Appeals' decision provides a fair, but stringent, standard of prejudice for evaluating claims of ineffective assistance of counsel at capital sentencing proceedings, a standard that is wholly consistent with precedent of this Court.

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-vs-

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, David Leroy Washington, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Fifth Circuit (Unit B) (en banc) in this case. That opinion is reported at 693 F.2d 1243. In this brief in opposition, the respondent will discuss several substantial reasons why this case should not be heard by the Court.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court to review this case by petition for writ of certiorari under 28 U.S.C. 1254(1). Respondent does not take issue with petitioners' statement of jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners have identified and set forth the constitutional and statutory provisions involved in this cause.

STATEMENT OF THE CASE

The respondent, David Leroy Washington respectfully refers this Court to the statement of the case set forth in the opinion of Judge Vance for the en banc court of appeals. (App. 4-19).[1] Several aspects of the record deserve special emphasis, however, because they frame the issues of ineffective assistance of counsel and provide a backdrop for a proper understanding of this case.

It is a critical historical fact, found by the district court, that Mr. Washington's trial counsel, William Tunkey, ceased any serious preparation or investigation of Mr. Washington's case approximately one month after being appointed, because he was immobilized by a "hopeless feeling" upon learning that Mr. Washington had confessed to two capital murders in addition to the one on which Tunkey was representing him. [R. 52, E.H. 19, 20-22, 57].[2] Tunkey acknowledged that after these confessions, he did not feel that "there was anything which [he] could do which was going to save David Washington from his fate." [E.H. 35.][3]

The district court found that "this feeling was behind [Tunkey's] failure to do an independent investigation into petitioner's background and potentially mitigating emotional and mental reasons for the killings" [R. 61], as Tunkey admitted at the evidentiary hearing. [E.H. 25-26, 28-29.][4] Tunkey's despair caused him to cease functioning as Mr. Washington's advocate in all but the most minimal way.

Tunkey's awareness of the strong likelihood that Mr. Washington would be convicted of three capital murders, however, should have been

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1 "App." refers to the separate Appendix to Petitioners' Petition for Writ of Certiorari.

2 Volume I of the record below will be referred to as "R."; Volume II, the transcript of the evidentiary hearing, as "E.H."; Volume III, the hearing on the stay of execution as "S.H.", and the transcript of the state court sentencing hearing as "Sent. H.".

3 Mr. Washington surrendered to police on the first murder charge on October 1, 1976. [Sen. H. 121-22.] On October 7, 1976, Mr. Tunkey was appointed to represent Mr. Washington on the first murder charge and related crimes. [E.H. 11-12.] On November 5, 1976, Mr. Washington confessed to two additional murders. [Sent. H. 21, 81, 82-94.] On December 1, 1976, he pled guilty to three charges of capital murder and several other crimes. Petitioner's sentencing hearing was conducted on December 6, 1976, and he was sentenced to die on that date.

4 Prior to learning of the confessions, counsel had been directing his efforts towards pre-trial motions and discovery. He had not conducted any separate investigation or preparation for the sentencing phase. [R. 52.]

the beginning and not the end of his efforts on Mr. Washington's behalf. Under Florida's bifurcated capital sentencing procedure, there is first a guilt phase and then a separate sentencing phase "to determine whether the defendant should be sentenced to death or life imprisonment." Fla. Stat. Ann. §921.141 (1). At the time of Mr. Washington's conviction, Florida law provided that at this sentencing hearing "evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated [in the statute]." Id.[5] In July 1976, several months before Mr. Washington's surrender to the authorities, this Court had sustained the constitutionality of the Florida death penalty statute, because that statute on its face requires the sentencer to focus on the individual circumstances of the crime and the character of the offender. Proffitt v. Florida, 428 U.S. 242, 251, 252 (1976).

Mr. Tunkey was wholly unprepared to participate as an advocate for Mr. Washington in this type of sentencing inquiry. Other than some conversations with Mr. Washington in jail, and some futile efforts to meet with Mr. Washington's wife or mother after briefly speaking with them on the telephone [R. 52-53], Tunkey conducted no investigation for witnesses who might provide mitigating information about Mr. Washington's character or background [R. 52]. Moreover, despite Tunkey's recognition from his interviews with Mr. Washington that there was "an absolutely inexplicable difference between the personality [of Mr. Washington] which I knew as compared to the crimes charged and the admissions he had made" [E.H. 39], Tunkey never sought a psychiatric or psychological examination of Mr. Washington for evidence of statutory or nonstatutory mitigating factors relating to Mr. Washington's mental state at the time of the offenses.[6]

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[5] Fla. Stat. Ann. §921.141(1)(1981 Supp.) has since been amended and now provides:

> "In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in [the statute]."

[6] The Florida statute enumerates two mitigating circumstances pertaining to a defendant's mental state: Fla. Stat. Ann. §921.141(6)(b) ("The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance"), and Fla. Stat. Ann. §921.141(6)(f) ("The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired").

Having failed to conduct any independent investigation into Mr. Washington's character and background or to seek any expert evaluation of Mr. Washington's mental state at the time of the crimes, Mr. Tunkey decided that he

> "really could find very little to address [him]self to in terms of a relevant, cogent presentation of mitigating circumstances as outlined by the statute itself and certainly insofar as aggravating circumstances are concerned. [he] did not feel exactly like [he] had sufficient ammunition to persuade anybody that the State was not going to succeed in showing at least that they outweighed the mitigating circumstances." [E.H. 37.]

He thus decided that at the sentencing hearing he would "attempt to convince the judge of Washington's sincerity and frankness in pleading guilty, recognizing the sentencing judge as a judge who had acknowledged his respect for individuals who came before him in the court and admitted their guilt." [R. 53, E.H. 36.] After Mr. Washington entered his guilty plea to three capital murders, Tunkey offered no testimony at the sentencing hearing in support of a life sentence, but relied solely upon certain portions of Mr. Washington's testimony at the guilty plea proceedings. [Sent. H. 158.][7] In his argument at the close of the hearing, Tunkey made no mention of Mr. Washington's family life or background, nor did he suggest that there was any independent information about Mr. Washington's character and life history, or mental state at the time of the crimes,[8] that should be considered by the sentencing judge.[9]

In point of fact, as now appears from the record before this Court, Tunkey could have presented a substantial amount of readily available

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[7] At these proceedings, Mr. Washington acknowledged his guilt and briefly referred to the pressure he was under at the time of the crimes. [Guilty plea proceedings at 19, 24-25.]

[8] Although Tunkey had asked the court in his sentencing memorandum to consider, as a mitigating circumstance, that "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance" (see note 6 supra), he made no explicit reference to the nature of Mr. Washington's mental state at the time of the crimes. Tunkey never requested a presentence report on Mr. Washington's mental state, social background or life history. The district could below found that such a presentence report "may have provided additional independent information in mitigation of the aggravating circumstances previously shown." [R. 69.]

[9] The district court did not find counsel's perfunctory closing argument, standing alone, to be "persuasive evidence of ineffectiveness" but found that it had to be evaluated "in light of the mitigating circumstances which may have been advanced upon a more complete investigation" [R. 69.]

evidence on the critical issue of whether Mr. Washington deserved to live or die. At the evidentiary hearing in the federal district court, affidavits from Mr. Washington's neighbors, friends, former employers, family members, and community members were introduced. All of the affiants state that they would have testified on Mr. Washington's behalf at his sentencing hearing but were never contacted by anyone involved in his defense.

These individuals all described David Washington as a responsible, non-violent young black man who did not use drugs or alcohol, was an active member of his church, was devoted to his family and eager to work, but was unable to find employment to support his wife and newly-born child. [Exhibits 1-14.] They consistently expressed their belief that the David Washington they knew was not the type to commit a murder; many of them remarked that violent behavior was completely "out-of-character" for him. [Id.][10]

Two affidavits of medical experts -- a psychiatrist and a psychologist -- were also introduced at the habeas hearing. [R. 54.] As the district court found, these experts provided "information relevant to the issue of mental or emotional stress" [R. 58] at the time of the crimes.[11] After the hearing, Mr. Washington submitted the affidavit of a second psychiatrist to the district court. This psychiatrist reported that at the time of the crimes Mr. Washington was under the influence of extreme mental or emotional disturbance, and that he was unable to conform his conduct to the requirements of the law (see note 6, supra). [R. 90-94.]

Based on this record, the district court found that counsel had failed to conduct an adequate investigation into factors relevant to the mitigation

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[10] Leonard Brady, a Dade County police officer, best summed up this view when he observed:

> "In all of the years that I have observed deviant behavior as a police officer, I have never seen anyone do something like David has done, with the history and character that David has." [Exhibit 14.]

[11] In brief, the psychiatrist and psychologist concluded that, while Mr. Washington was legally sane at the time of the crimes, his violent actions were attributable to the uncontrollable eruption of long-suppressed feelings of self-hatred and anger generated by the physical abuse and unstable family situation he had experienced as a child, combined with the severe frustration and depression concerning his financial problems. Both doctors noted that Mr. Washington expressed remorse during their interviews with him. [Exhibits 16, 17.]

of Mr. Washington's sentence, and that such an investigation "would have produced generally favorable information from family, friends, former employers, and medical experts" [R. 61] about Mr. Washington's character, background, social history and mental state at the time of his crimes. But for Mr. Tunkey's failure to conduct an independent investigation for those witnesses, this evidence would have been before the tribunal that decided whether Mr. Washington was to live or die.

However, because the district court held that a death-sentenced prisoner must shoulder the additional burden of establishing that the outcome of his sentencing hearing would have been different in the absence of counsel's derelictions of duty, the petition for a writ of habeas corpus was denied (App. 285-86). In reaching this determination, the district court relied in part on the testimony of the state sentencing judge who believed he would have still imposed the death sentence "even if he had considered the live testimony of character and psychiatric witnesses." (App. 285).

A panel of the United States Court of Appeals for the Fifth Circuit (Unit B) reversed the judgment and remanded the case to the district court for the following: (1) to determine whether respondent's trial counsel was ineffective without regard to the prejudicial effect that may have resulted from counsel's errors, and (2) if it finds that trial counsel was ineffective, to grant relief if petitioner proves that "but for his counsel's ineffectiveness his trial, but not necessarily its outcome, would have been altered in a way helpful to him." Washington v. Strickland, 673 F.2d 879, 902 (5th Cir. 1982) (Unit B). Finally, since the admission of the state sentencing judge's testimony had provided an independent basis for reversal, the panel also directed the district court, in assessing the prejudicial impact of counsel's ineffectiveness, to disregard the judge's testimony that the additional evidence would not have affected his verdict.

The en banc court, while reversing the judgment of the district court, sharply circumscribed the scope of the panel's decision in two major respects. First, after comprehensively canvassing the law in this country relating to claims of ineffective assistance based on a failure to investigate, the court concluded that "when a strategic choice by counsel makes unnecessary a certain line of investigation, it is not required that effective counsel pursue that investigation." (App. 19). Second, relying on this Court's recent

decisions in United States v. Morrison, 449 U.S. 361, 364-65 (1981) and United States v. Frady, 456 U.S. 152, 170 (1982), the majority rejected the panel's formulation of the standard of prejudice and instead placed the burden upon a habeas petitioner to demonstrate "that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense." (App. 75).

However, the en banc court did reaffirm the panel's conclusion that a portion of the sentencing judge's testimony at the habeas hearing "was inadmissible evidence that may not be considered by the district court." (App. 77).

Because of its conclusion that the district court failed to make appropriate factual determinations on the issue of ineffective assistance of counsel and that "one portion of [the state sentencing judge's] testimony was inadmissible," (App. 81), the en banc court found it "necessary to remand the case to the district court for further findings." (App. 81).

I.

THERE IS AN INDEPENDENT AND WELL-ESTABLISHED NON-CONSTITUTIONAL GROUND FOR AFFIRMING THE JUDGMENT OF THE COURT OF APPEALS WITHOUT REGARD FOR THE CONSTITUTIONAL QUESTION ASSERTED IN THE PETITION CONCERNING THE STANDARD FOR REVIEW OF CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL

The petitioners seek to have the Court review the court of appeals' conclusion that the test of prejudice in United States v. Frady, supra, should be applied to claims of ineffective assistance of counsel at capital sentencing proceedings. Petitioners fail to explain that the judgment of the district court must be reversed, and that of the en banc court of appeals affirmed, for independent, non-constitutional error of the habeas court in admitting, over vigorous objection, portions of the state sentencing judge's testimony. For this reason, any ruling by this Court on the constitutional question suggested by the petitioners would be tantamount to an advisory opinion on a constitutional issue since a non-constitutional basis for affirming the judgment of the court of appeals is evident from the record. Under these circumstances, certiorari is inappropriate and should be denied.

In rejecting respondent's claims in his habeas petition, the district court considered testimony of the state sentencing judge "in which he explained his reasons for imposing the death sentence and his probable response to the evidence adduced at the habeas hearing." (A. 77). The en banc majority concluded that "[i]t is a firmly established rule in our jurisprudence that a judge may not be asked to testify about his mental processes in reaching a decision." (A. 77). This rule originated with the seminal 1904 decision of this Court in Fayerweather v. Ritch, 195 U.S. 276, 306-07 (1904). In the intervening eighty years, this rule has never been questioned by this Court or, to respondent's knowledge, by any other federal court. Rather, the Fayerweather principle has been repeatedly reaffirmed by this Court. See, e.g., Chicago B. & Q. Ry. Co. v. Babcock, 204 U.S. 585, 593 (1907); United States v. Morgan, 313 U.S. 409, 422 (1941).

Indeed, as the en banc majority noted, the rule has particular force in the present circumstances because "a rule that allows the probing of the mental processes of a state judge would exacerbate certain problems that are already inherent in the habeas corpus context" (App. 79):

> "The tendency of the habeas proceeding to detract from 'the perception of the trial of a criminal case in state court as a decisive and portentous event,' Wainwright v. Sykes, 433 U.S. at 90, 97 S.Ct. at 2508, is enhanced by the prospect that the state trial judge may be called into federal court several years later to recreate his thought processes at the criminal trial. Additionally, the friction between the state and federal systems of justice can hardly be alleviated by a rule that permits the parties to interrogate a state judge in federal court regarding the basis for his decision. See e.g., Rose v. Lundy, 455 U.S. at ____, 102 S.Ct. at 1203; Sumner v. Mata, 449 U.S. 539, 550 & n. 3, 101 S.Ct. 764, 771 & n. 3, 66 L.Ed. 2d 722 (1981)." (App. 79-80).

The failure of the district court to exclude evidence that violated the Feyerweather principle was one of the bases for the en banc court's determination "to remand the case to the district court for further findings." (App. 81). Since this non-constitutional evidentiary error of the district court forms a separate and independent basis for affirming the en banc court's judgment, without even reaching the constitutional questions asserted by petitioners, certiorari is inappropriate on the present record.

II.

CERTIORARI IS INAPPROPRIATE BECAUSE THE COURT OF APPEALS REMANDED THE CASE FOR ADDITIONAL FACTUAL DETERMINATIONS BY THE DISTRICT COURT WHICH COULD OBVIATE, OR AT THE VERY LEAST CLARIFY, THE SCOPE OF THE CONSTITUTIONAL QUESTIONS PRESENTED BY THE PETITIONERS

Respondent submits that certiorari is also inappropriate because the present case is not ripe for review in this Court. This court has historically relegated the task of formulating and applying tests of effective representation by counsel to the lower federal courts. Such an approach recognizes that these claims are more appropriately resolved on a case-by-case basis because of the fact-specific nature of the judicial inquiry. The present case is no different, and this Court should await a fully developed factual record before deviating from its traditional manner of handling ineffective assistance of counsel claims and exploring the questions presented by the petitioners.

In a carefully reasoned and well-documented opinion, the en banc court of appeals has established specific requirements for assessing a claim of ineffective assistance of counsel based on a failure to investigate. First, a habeas petitioner must establish that counsel was ineffective (App. 73-55). Second, the habeas "petitioner must show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense." (App. 75). Finally, "even if the defense suffered actual and substantial disadvantage, the state may show in the context of all the evidence that it remains certain beyond a reasonable doubt that the outcome of the proceeding would not have been altered but for the ineffectiveness of counsel." (App. 76).

After thoroughly reviewing the decision of the district court, the court of appeals concluded that the present factual record is wholly inadequate to make the critical factual determinations that are essential for a proper resolution of respondent's constitutional claims. Specifically, the court of appeals found

that the district court did not even make the threshold inquiry when a habeas petitioner alleges that counsel failed to conduct an adequate investigation -- the court "did not evaluate the credibility of [trial counsel's] testimony or the reasonableness of his strategy in light of available alternatives." (App. 23). This is a critical "question of fact for the district courts" (App. 49, n. 23), but one on which the present record is wholly barren. It is a factual question whose resolution depends "upon a variety of factors including the number of issues in the case, the relative complexity of those issues, the strength of the government's case, and the overall strategy of trial counsel." (App. 23-24). These are factors which only can be assessed by the district court on the basis of the testimony and evidence at the habeas hearing. As the court of appeals aptly noted:

> "In this case numerous factual issues remain to be resolved by the district court before it can be determined with certainty whether counsel was reasonably effective." (App. 33).

But these are not the only fact-specific questions that have not been considered in the first instance by the district court or the court of appeals. Additionally, the district court never considered "whether the [respondent] suffered actual and substantial detriment to the conduct of his defense." (App. 81). Nor did the court ever determine whether, "in the context of the entire case, the detriment suffered was harmless beyond a reasonable doubt." (App. 82-83).

As is evident from the above discussion, the present record is undeveloped for a proper and considered assessment of the questions presented by the petitioners. First, the essential factual findings relating to counsel's ineffectiveness have simply not been made. Clearly, if the district court on remand concludes that trial counsel's strategic choice was reasonable or credible in the particular factual circumstances of the present case, there is really no need for this Court or any other court to

consider what standard of prejudice is applicable. Similarly, if the factual determinations on the issues of actual and substantial prejudice or on the harmlessness of the error beyond a reasonable doubt are unfavorable to the respondent, then the present petitioners would have prevailed in the district court and the petition would be denied.

Simply put, the record is not ripe for this Court's review and consideration of the questions presented by petitioners at this juncture would be premature. Further factual development in the district court could obviate, or at least clarify, the constitutional question presented by respondents. Before this Court deviates from its well-established course in reviewing claims of ineffective assistance of counsel, it should await the crystallization of constitutional issues on a fully developed record. Certiorari is therefore inappropriate in the case at bar, because further proceedings are required before the case is ripe for review.

III.

CERTIORARI IS INAPPROPRIATE BECAUSE THE EN BANC COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENT

In requiring a habeas petitioner to demonstrate that counsel's ineffectiveness "'worked to his actual and substantial disadvantage,'" (App. 56), the en banc court of appeals adopted the explicit language of this Court in United States v. Frady, 456 U.S. 152, 170 (1982).

Indeed, a review of the court of appeals' analysis of this issue reveals that it is solidly grounded in this Court's precedent and fairly, but stringently, accommodates the interests of the State and the death-sentenced defendant. First, the court of appeals, relying on United States v. Morrison, 449 U.S. 361, 364-65 (1981), rejected any per se rule of prejudice in assessing a claim of ineffective assistance of counsel (App. 57-65). Second, the court concluded that prejudice to the habeas petitioner would not be presumed in these circumstances, but that the capitally-sentenced defendant would still have to show harm from counsel's defalcations. (App. 66-70).

Then, in rejecting the outcome determinative test of prejudice, which has only been adopted in the District of Columbia Circuit,[12]

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[12] Contrary to the assertions of the petitioners, the District of Columbia Circuit in United States v. DeCoster, 624 F.2d 196, 208 (D.C. Cir. 1979) (en banc), remains the only federal circuit that has adopted an "outcome-determinative" standard of prejudice in assessing claims of ineffective assistance of counsel. Three Circuits (the First, Fourth and Ninth) have expressed no opinion on the question. See, e.g., United States v. Bosch, 584 F.2d 1113, 1122-23 (1st Cir. 1978); Cooper v. Fitzharris, 586 F.2d 1325, 1333 (9th Cir. 1978) (en banc) (Standard of prejudice "does not mean" that the reviewing court must weigh the evidence for itself and conclude that "the defendant would have been acquitted but for counsel's blunders.") One (the Tenth) places a "harmless beyond a reasonable doubt" burden on the State. United States v. Payne, 641 F.2d 866, 867-68 (10th Cir. 1981). Two circuits (the Sixth and Seventh) place the burden on the accused to show that counsel's ineffectiveness "deprive[d] . . . [him] of a substantial defense," Beasley v. United States, 491 F.2d 687, 696 (6th Cir. 1974), or engendered some "specific loss." United States ex rel Ortiz v. Sielaff, 542 F.2d 377, 380 (7th Cir. 1976). Two circuits (the Third and Eighth), hold that the accused must first demonstrate that, but for counsel's ineffectiveness, the proceedings before the trier of fact would have been materially different in a way "helpful" or "beneficial" to the accused; then, once the accused meets this burden, the burden shifts to the State to show that

(Footnote continued on next page)

the court of appeals reasoned as follows:

> "First, in cases where the allegation of ineffective assistance is based upon counsel's failure to raise certain objections, the Decoster test requires the petitioner to carry a burden of showing prejudice that is different from and greater than the analogous burden in the "cause and prejudice" formulation of Wainwright v. Sykes, 433 U.S. 72, 87, 97 S.Ct. 2497, 2506, 53 L.Ed. 2d 594 (1977). Application of the Decoster rule may thus have the surprising result of holding a petitioner who has established a deprivation of his constitutional right to effective assistance of counsel to a greater showing of prejudice than if he was merely trying to present a claim of constitutional error not raised in the state courts." (App. 71) (emphasis added).

Finally, the court adopted a test of prejudice that had been articulated by this Court as recently as last term in United States v. Frady, supra. The court of appeals reasoned that this standard, which requires a habeas petitioner to "show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense," (App. 75), would effectively accommodate the interests of the habeas petitioner and the State.

(Footnote 12 continued)

counsel's ineffectiveness was harmless beyond a reasonable doubt. Third Circuit: United States ex rel. Green v. Rundle, 434 F.2d 1112, 1115 (3rd Cir. 1970) (emphasis added) (initial prejudice burden is on the accused to show that "the missing evidence [not presented due to counsel's ineffectiveness] would be helpful"); United States ex rel. Johnson v. Johnson, 531 F.2d 169, 177 (3rd Cir. 1976) (once the accused meets the initial burden, the state may avoid relief by showing that the breach of duty was "harmless beyond a reasonable doubt"); Eighth Circuit: McQueen v. Swenson, 498 F.2d 207, 220 (8th Cir. 1974) (emphasis added) ("the petitioner must shoulder an initial burden of showing the existence of admissible evidence which could have been uncovered by reasonable investigation and which would have proved helpful to the defendant . . . . Once this showing is made, a new trial is warranted unless [the State proves] . . . such evidence was harmless beyond a reasonable doubt." While the remaining circuit (the Second) utilizes a standard akin to the outcome determinative text, LiPuma v. Commissioner Department of Corrections, 560 F.2d 84, 92 (2d Cir. 1977), that is attributable to the Circuit's anachronistic retention of the "farce and mockery" standard for assessing counsel's performance. See, e.g., United States v. Williams, 575 F.2d 388, 393 (2d Cir. 1978).

> "This burden is of sufficient magnitude to discourage the filing of insubstantial claims and to focus the attention of the district court on the actual harm suffered by the petitioner as a result of his counsel's performance. At the same time, the burden does not require the petitioner to produce evidence to which he is unlikely to have access. It also properly reserves for the state the ultimate burden of showing that any constitutional error that did occur was harmless beyond a reasonable doubt." (App. 75-76).

In sum, the decision of the en banc court of appeals relies exclusively and explicitly upon precedent of this Court so that any claim of inconsistency is wholly belied by a careful review of the court of appeals' opinion. Moreover, the standard adopted by the en banc court is consistent with, and more stringent than, that of every other federal circuit, with the exception of the anomalous decision of the District of Columbia Circuit in United States v. DeCoster, supra (see note 11, supra). Finally, as the en banc majority explained, it is DeCoster, not the case at bar, that is inconsistent with this Court's prior decisions for it "requires the petitioner to carry a burden of showing prejudice that is different from and greater than the analogous burden in the 'cause and prejudice formulation of Wainwright v. Sykes [citation omitted]." Under these circumstances, certiorari should be denied, since the court of appeals has correctly reasoned and appropriately decided the constitutional issues in the case at bar.

CONCLUSION

For the reasons mentioned above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 9, 1983

IN THE

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CHARLES E. STRICKLAND, SUPERINTENDENT FLORIDA STATE PRISON; JIM SMITH, ATTORNEY GENERAL OF FLORIDA, AND LOUIS L. WAINWRIGHT, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,

Petitioners,

-vs-

DAVID LEROY WASHINGTON,

Respondent.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The respondent, David Leroy Washington, who is presently incarcerated in Florida State Prison, Starke, Florida, requests leave to file the attached Respondent's Brief In Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Respondent was granted leave to proceed in forma pauperis in the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Fifth Circuit (Unit B).

Counsel has mailed, but has not yet received, the completed affidavit from respondent in support of this motion. As soon as counsel receives this affidavit, he will forward it immediately to the Court.

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Dated: May 9, 1983